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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

VANESSA HAMILTON,

Plaintiff and Appellant,

v.

ORANGE COUNTY SHERIFF'S
DEPARTMENT,

Defendant and Respondent.

G057049

(Super. Ct. No. 30-2013-00688296)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

Law Offices of Akudinobi & Ikonte, Chukwemek Akundinobi, Chijioke O. Ikonte and Emmanuel C. Akudinobi for Plaintiff and Appellant.

Lawrence Beach Allen & Choi, Jin S. Choi, Christina M. Sprenger, and Natalie F. Price for Defendant and Respondent.

* * *

The court granted summary judgment to defendant Orange County Sheriff's Department (Sheriff) in plaintiff Vanessa Hamilton's action for employment discrimination. Hamilton's theory was that one of her trainers at the Sheriff's academy, Deputy Sandberg, held racial animus against her. She based that conclusion on his stated opposition to her graduating from the academy, as well as rude and insensitive conduct he exhibited toward her. Although Deputy Sandberg was not the decisionmaker who dismissed Hamilton, she theorized that he orchestrated the dismissal behind the scenes—a so-called “cat's paw” theory. The court found, however, that Hamilton failed to proffer evidence to support that theory. We agree with the trial court's assessment and affirm the judgment.

FACTS¹

Hamilton's Struggle and Dismissal from the Academy

Hamilton is an African-American female who, prior to enrolling in the Sheriff's academy, worked for the Sheriff as a correctional services assistant (CSA). Upon her admission to the training program, Hamilton signed a document acknowledging that she was beginning a new employment with the Sheriff, which included a new probationary period, and that if she were to fail to complete the academy, she would have no right to return to her prior position.

Hamilton's training commenced in September 2011. From the outset, Hamilton struggled with the physical training. She consistently fell behind in running exercises, missed one physical training session, and had to be corrected for “cheating” on pushups. Her performance did not improve over the ensuing weeks. She continued to

¹ Because this is an appeal from a summary judgment motion, we will resolve all factual disputes in the record in favor of plaintiff.

miss physical training sessions and fell significantly behind the rest of the class in running exercises.

The comments from her trainers in Hamilton's training file indicate they had serious reservations about the effort Hamilton was putting in. On October 18, 2011, which was about four weeks into the program, one trainer with the initials VA wrote, "Hamilton is physically unfit and lacks heart and dedication to the academy program." On November 9, 2011, a trainer with the initials CB wrote, "Today during the class run Hamilton fell behind the class again. She is unable to do her job." "She is content to just get by. She is aware of the academy minimum standard (2 minutes behind the class) and is using it to her advantage. She is obviously just in this for herself and is not a team player. In the two months Hamilton has been here I have seen her give nothing but minimum output. From what I have observed she has no business being a Deputy Sheriff and needs to go back to being a CSA."

At her mid-term review in November 2011, Hamilton was assessed on 15 core competencies. She received marks of unsatisfactory (the lowest score) on 11 of the competencies, improvement needed (second lowest score) in three competencies, and competent in one competency. The report included the following assessment: "At the mid-term, Recruit Hamilton is ranked 23rd out of 37 recruits with an overall score of 90%. Her most notable performance is in written exams where she is ranked 25th with a score of 91%. At this point, Staff feels Recruit Hamilton is not prepared for the Academy and is performing below standards for a Week 10 recruit. She has extreme difficulty completing the distance runs with her class. Staff agrees with her peers in that she does not take the program seriously. This is evidence[d] in the fact that she does not complete her assigned work. On several occasions, she has reported without doing her Remedial Instruction Reports or her assigned Crime Reports. Recruit Hamilton is not responding to training and if her behavior does not dramatically change, Staff feels she will be a potential liability for the department."

On December 21, 2011, an incident occurred that led directly to Hamilton's dismissal. Hamilton was assigned to be the class sergeant. According to protocol, the platoon sergeant (another leadership position held by a class recruit) was supposed to submit information reports to the tactical staff during the second break of the day at approximately 10:00 a.m. That day, at approximately 12:30 p.m., Hamilton entered the tactical staff office and requested to turn in an information report. One of the staff, Sergeant Martino, asked Hamilton why she was not following protocol and what the class assistant (another leadership position held by a class recruit) thought about the breach in protocol. Hamilton replied that she did not ask the class assistant about the matter. Another staff member then asked the class assistant about the matter, who stated that he had in fact spoken with Hamilton and informed her that it was the platoon sergeant's responsibility to turn in the reports. Hamilton eventually admitted that the class assistant had in fact said that. Afterward, tactical staff formed the opinion that Hamilton had not been honest and that her behavior indicated a lack of integrity. Deputy Sandberg, who was apparently present during this interaction, commented, "Sarge, she needs to go."

As a result, another member of the tactical staff, Sergeant Missel, drafted a memorandum recommending Hamilton's immediate dismissal from the academy. After recounting her poor performance in physical training and the lying incident, he wrote, "This behavior is a serious concern to the law enforcement profession and contradicts everything we teach here at the academy."

Afterward, Lieutenant Virgoe wrote a memorandum to similar effect, stating Hamilton "has consistently performed below the acceptable standard and is not showing any sign of improvement." "The Tactical Staff believes that Hamilton does not have the emotional maturity or the physical ability to perform as a Deputy Sheriff. I recommend she be removed from the program."

Captain Bland, the captain of the training division, who herself is an African-American female, also recommended Hamilton's dismissal. She wrote, "Over the past weeks, Hamilton has performed at a passing but well below average level. Hamilton has been given several opportunities to improve and excel but she has not. Trainee Hamilton is not able to grasp or retain basic concepts and requirements of the DST training program. This is evident by her work habit and job knowledge percentages which are both well below average. Hamilton arrived at the academy unprepared and is still struggling with all aspects of academy protocol. Although these shortcomings were identified early on the tactical training team believed that time and practice would help to improve Hamilton's performance so she was allowed to continue. Unfortunately, time has not helped Hamilton to improve and as the program enters its final months her shortcomings in the academy have become magnified." The memorandum then recounted poor physical performances as well as the incident of dishonesty. It continued, "We believe that Hamilton's poor performance is because Hamilton believes she can do the minimum and still pass the academy program."

Once Hamilton was dismissed, she had no right to any employment with the Sheriff. Nonetheless, she was offered, and accepted, a position as a Sheriff's records technician. She was eventually promoted back to her original position as a CSA.

Alleged Racial Animus

Hamilton believes that, during the academy, she was mistreated on account of her race by one of the trainers, Deputy Sandberg, who is Caucasian. Deputy Sandberg never expressed any racial epithet or racially derogatory statement." And there was one other African-American in her class who successfully completed the academy. However, a number of incidents led Hamilton to believe Deputy Sandberg harbored racial animus against her.

First, during week four of the academy, Deputy Sandberg told Hamilton it was his job to get her thrown out of the academy. The recruits were in formation at the time and Deputy Sandberg shouted it in front of Hamilton. Sandberg never made a similar threat to other classmates outside of her race who were performing worse than her at the academy.

The second incident occurred during what was supposed to be a non-competitive physical training exercise. The class was engaged in a cross-fit workout and Hamilton and one other trainee, recruit Felix, were the last two not to have completed the workout. Toward the end of the workout, Deputy Sandberg stopped Hamilton and asked if she believed she had done the workout correctly. Meanwhile, recruit Felix had passed Hamilton. Once Deputy Sandberg stopped his questioning of Hamilton and allowed her to complete the exercise, he shouted, “Beat her, Felix. Don’t let her catch up. Beat her Felix.”

In the third incident, Deputy Sandberg was quizzing Hamilton on certain Penal Code provisions during an inspection after a workout. She did not know the correct answers. “She started swaying back and forth and dropping her head”; she reported feeling dizzy and lightheaded. Deputy Sandberg told her to sit down on the ground, which Hamilton found demeaning, while an emergency medical technician (EMT) was called. Deputy Sandberg wrote in Hamilton’s file that Hamilton told the EMT that she panicked. He commented, “This is a serious officer safety issue. When put in a stressful situation today, Recruit Hamilton almost passed out. When I read Hamilton this entry, she stated she never told [the EMT] she panicked.” Two days later, Sandberg followed up with the EMT, and the EMT stated there was a miscommunication and Hamilton never actually said she panicked; that was just his theory of the incident. Deputy Sandberg reported the clarification in Hamilton’s file.

In another incident, Deputy Sandberg stopped Hamilton in the hall and asked, “Hamilton, how many points are you away from a 70 percent on your staff evaluation?” Hamilton replied, “Sir, nine points, sir.” Deputy Sandberg stated, “Well, I’m not going to give it to you.” Seventy percent was the minimum to achieve a passing score.

In a fifth incident, which did not involve Deputy Sandberg, the class had to fill out mid-term peer evaluations that essentially asked each recruit to report on the competence and trustworthiness of every other recruit. The class had apparently all given each other outstanding scores. Sergeant Martino rejected those evaluations, instructing the class to redo them because “people like Hamilton, who can’t even run, received yeses to become a police officer.” In the second round of peer reviews Hamilton was ranked last. While Hamilton does not accuse Sergeant Martino of harboring racial animus, she believes Sergeant Martino was influenced by Deputy Sandberg.

Finally, Hamilton believes racial animus was demonstrated by the fact that people who scored lower grades than her in the academy were ultimately allowed to graduate. She admitted, however, that she did not know what grades the other recruits received after she was dismissed.

Hamilton filed her complaint against the Sheriff in November 2013, asserting causes of action for employment discrimination and retaliation.

The Sheriff moved for summary judgment, which the court granted. It concluded, “While plaintiff presents a compelling case of disparate treatment by Tactical Officers, plaintiff presents no evidence from which a reasonable jury could find that she was subjected to unlawful discrimination *on account of her race*. Defendant had a legitimate, non-discriminatory reason for terminating plaintiff—more than just the ‘integrity incident’ which might have been blown slightly out of [proportion]. All of plaintiff’s training officers formed the opinion—right or wrong—that plaintiff was lazy and did not have the heart/disposition for a deputy sheriff. This was an opinion they were

free to form since it was not based on plaintiff's race. The other African American recruit graduated, and the academy was overseen by an African American female Captain. Nothing about plaintiff's treatment suggests race played a part.²

Hamilton timely appealed.

DISCUSSION

Hamilton contends she proffered enough evidence to overcome the summary judgment motion on her discrimination claim. "Summary judgment is appropriate 'if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" "Our review is de novo. [Citation.] We liberally construe the opposing party's evidence and resolve all doubts in favor of the opposing party. [Citation.] We consider all evidence in the moving and opposition papers, except that to which objections were properly sustained." (*Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 443.)

"In the context of an employer's motion for summary adjudication of a discrimination claim, . . . the employer "has the initial burden to present admissible evidence showing either that one or more elements of [the] plaintiff's prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory factors.'" (*Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 738.) Once defendant has satisfied that burden, "the burden shifts to

² The court's summary judgment ruling included her retaliation claim, noting Hamilton "all but ignores her own retaliation cause of action in this motion, electing not to brief the issue at all." Nevertheless, the court issued a detailed analysis. Hamilton has once again ignored the retaliation claim on appeal, and thus we do not address the issue. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 ["Issues not raised in an appellant's brief are deemed waived or abandoned"].)

the [plaintiff] to “demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory animus, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action.”” (Ibid.)

Undoubtedly, the Sheriff satisfied its initial burden here. Hamilton’s performance was poor in critical areas and the training staff had serious reservations about her motivation, and ultimately about her character. The question then becomes whether plaintiff satisfied her burden of producing substantial evidence of a discriminatory motive.

We conclude she did not. Plaintiff’s theory relies on a chain of inferences that is unsustainable considering the entire factual record. The key unsubstantiated premises of her argument are (1) that Deputy Sandberg had discriminatory motives, and (2) that he was able to influence the rest of the command staff to dismiss her. Neither premise is supported by substantial evidence.

First, there is nothing in the record to suggest Deputy Sandberg’s conduct was motivated by Hamilton’s race. He did not make any comments to suggest racial bias, and the other African-American in the class passed the academy without incident, so far as the record reveals. Some of Deputy Sandberg’s comments indicate he did not want Hamilton to pass the academy. But the record furnishes a ready explanation for that: she performed poorly, was perceived to be lazy, and ultimately was perceived to be dishonest. This opinion was widely shared by the training staff, who, Hamilton concedes, did not harbor racial animus; it was not unique to Deputy Sandberg. There is simply nothing in the record to suggest that Deputy Sandberg’s opinion was based on Hamilton’s race.

Hamilton relies on the fact that a few recruits had performance scores that were lower than hers. But Hamilton was not dismissed simply because of her performance scores. It was her performance scores, *plus* her apparent lack of motivation,

plus her apparent lack of integrity. Hamilton has not identified any recruits with that combination of perceived flaws, and thus she has not shown she was treated any differently than her nonAfrican-American peers would have been under the circumstances.

An even larger flaw in Hamilton's evidentiary showing is that Deputy Sandberg was not the ultimate decision maker, and there is a complete dearth of evidence that he somehow orchestrated the actual decision makers to dismiss her improperly. Hamilton's claim is not that she is entitled to damages for having been treated rudely by Deputy Sandberg; it is that she was dismissed because of her race. Yet she concedes that every single person involved in that decision, except for Deputy Sandberg, held no racial animus whatsoever. There was an entire chain of command responsible for Hamilton's dismissal, from sergeant to lieutenant, to captain, to commander. Deputy Sandberg was at the bottom of that chain of command. Yet Hamilton claims he used everyone else as a "cat's paw" to get rid of her. Hamilton has set a tall evidentiary task for herself.

Her evidentiary showing, however, fell well short. The sum total of the evidence of Deputy Sandberg's involvement in the decision to dismiss Hamilton was his spontaneous comment, "Sarge, she needs to go," after discovering Hamilton's perceived lie concerning the information report. The notion that his recommendation somehow influenced his fellow staff trainers *and* the entire chain of command to unanimously recommend dismissal is far-fetched. The highest authority recommending Hamilton's dismissal, Captain Bland, was herself an African-American female, and the reasons for her recommendation were entirely rational and supported by the evidence. There is no evidence at all that Deputy Sandberg even *could* have influenced her improperly, much less that he did so. The record does not permit a reasonable inference that Deputy Sandberg used the command staff as a "cat's paw" to dismiss Hamilton. "[E]ven though we may expect a plaintiff to rely on inferences rather than direct evidence to create a factual dispute on the question of motive, a material triable controversy is not established

unless the inference is reasonable. And an inference is reasonable if, and only if, it implies the unlawful motive is more likely than defendant's proffered explanation. [Citation.] If plaintiff fails to produce substantial responsive evidence to demonstrate a material triable controversy, summary judgment is properly granted." (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038-1039.)

In the end, the purpose of a summary judgment motion is to put plaintiff's proof to the test to determine whether there is any point to a trial. Allegations, conjecture, and speculation are not enough to carry the day. But ultimately, that is all Hamilton has. The Sheriff, by contrast, provided a robust evidentiary showing that explains the valid, nondiscriminatory reasons why Hamilton was dismissed. The court did not err in granting the Sheriff's motion.

Most of Hamilton's brief is dedicated to her argument that her evidence created a triable issue of material fact, but she raises one additional claim: that the court erred by failing to rule on her evidentiary objections. From there, Hamilton asks us to rule on the objections.

When a trial court entirely fails to rule on objections made in a summary judgment motion, the objections are deemed overruled and the objections are preserved for de novo appellate review. (*Reid v. Google* (2010) 50 Cal.4th 512, 534.) But evidentiary issues on appeal must be addressed like any other claim of error: with argument and authority as to why, under the proper standard of review, the court erred; and with an explanation of how the error was prejudicial. Hamilton has not performed any of that essential analysis. She simply restates her objections. That is insufficient. The objections are waived. (See *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655 ["the trial court's judgment is presumed to be correct, and the appellant has the burden to prove otherwise by presenting legal authority on each point made and factual analysis, supported by appropriate citations to the material facts in the record; otherwise, the argument may be deemed forfeited"]; *Paterno v. State of California* (1999) 74

Cal.App.4th 68, 106 [“our duty to examine the entire cause arises when and only when the appellant has fulfilled his duty to tender a proper prejudice argument”].)³

DISPOSITION

The judgment is affirmed. The Sheriff shall recover its costs incurred on appeal.

IKOLA, J.

WE CONCUR:

O’LEARY, P. J.

BEDSWORTH, J.

³ In any event, had the objections not been waived, we would overrule plaintiff’s objections to exhibits C and D to the Sheriff’s motion under the business records exception to the hearsay rule (Evid. Code, § 1271) based on the foundation laid in the declarations of Sergeant Missel and Sergeant Martino. The objections to paragraphs 9 and 11 through 15 of Sergeant Missel’s declaration would be overruled as follows: paragraph 9, not hearsay; paragraph 11, not hearsay; and paragraphs 12 through 15, either not hearsay or falling within the party admission exception to the hearsay rule (Evid. Code, § 1220).